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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of ELIZABETH A. and
BRADLEY A. BOYD.

ELIZABETH A. BOYD,

Petitioner,

v.

BRADLEY A. BOYD,

Respondent and Appellant.

D052514

(Super. Ct. No. D473583)

APPEAL from an order of the Superior Court of San Diego County, Lisa Foster,
Judge. Affirmed in part, reversed in part and remanded for further proceedings.

Bradley Boyd appeals from a post dissolution order of the family court that, in part, modified his obligation to pay child support. He contends the family court abused its discretion in awarding additional child support as a percentage of his undetermined future earnings and based upon an excessive work schedule. He also contends the

evidence did not support the order and that the court erred in failing to state findings as to why the guideline child support amount was unjust and in failing to cap the amount of support.

We conclude that the court made insufficient findings and that the evidence does not support the order. Accordingly, we reverse the challenged portion of the order and remand the matter for further proceedings in accordance with this opinion. In all other respects the order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The clerk's transcript contains little information regarding the history of this action; accordingly, we requested the family court file and take judicial notice thereof. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

Bradley and Elizabeth Boyd were married in July 1989 and had three children. They divorced in 2003, stipulating that the children's primary residence would be with Elizabeth, that Bradley's visitation timeshare would be 20 percent and that Bradley would pay monthly child support of \$1,652.

In April 2004, Elizabeth sought, among other things, to modify child support because Bradley had accepted a job in Iraq and would be receiving a substantial increase in pay. The parties agreed to increased child support of \$2,768 per month based on Bradley's gross monthly income of \$10,001 while in Iraq. Because Bradley could be paid up to \$13,332 per month if he worked overtime, the parties agreed that Bradley would pay additional child support of 30 percent of all gross income received above the minimum \$10,001 per month on a monthly basis and that Bradley would provide

Elizabeth with copies of his paychecks. Bradley ultimately worked in Iraq for the following time periods: November 27, 2006 to December 15, 2006; January 8, 2007 to March 22, 2007; and June 6, 2007 to July 30, 2007.

In December 2005, March 2006 and June 2006, the family court issued orders, among other things, modifying the child support paid by Bradley. The June 2006 order set child support at \$1,493 per month and Bradley's visitation time share at 30 percent.

On May 24, 2007, Elizabeth again petitioned to, among other things, modify child support. She claimed that Bradley's income had increased based on his employment in Iraq and that his visitation timeshare had decreased. In his responsive declaration, Bradley argued that child support should not be modified because his increased income was based on an extraordinary work regimen of 72 hours per week in a dangerous location. He stated that he would not be returning to Iraq for any more extended business trips and that his last trip there ended in July 2007. After hearing argument, the family court took the matter under submission.

In its written order, the family court found that the parties' 2004 stipulated agreement was no longer in effect and although there was no evidence Bradley would be offered or would accept a similar assignment in the future, it ordered that "if in any month Bradley's gross earnings exceed [\$9,000], he is to pay 30 [percent] of the amount over [\$9,000] to Elizabeth as additional child support." The family court also addressed arrearages, spousal support and retroactively adjusted the guideline child support amount to reflect a change in the visitation timeshare allotted, but these findings are not at issue in this appeal.

DISCUSSION

I. *General Legal Principles and Standards of Review*

A family court must calculate child support based on the guideline formula set forth in the statute. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 284 (*Cheriton*); *In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009, 1013.) Whenever a family court departs from the guideline amount, it must state its reasons in writing or on the record, as well as the amount of support that would have been ordered under the guideline formula and the reasons that the amount of support ordered differed from the guideline formula amount and why that amount is consistent with the best interests of the children. (Fam. Code, § 4056, subd (a), all further statutory references are to this code.)

Although the guideline amount is presumptively correct (§ 4057, subd. (a); *In re Marriage of Laudeman, supra*, 92 Cal.App.4th at p. 1013, fn. 2), the presumption may be rebutted by evidence that application of the guideline "would be unjust or inappropriate . . . because one or more [specified] factors is found to be applicable[.]" (§ 4057, subd. (b).) One such factor is whether "[a]pplication of the formula would be unjust or inappropriate due to special circumstances in the particular case." (§ 4057, subd. (b)(5).)

A key component of the guideline child support calculation is the parents' income (§ 4055, subd. (b)(1)(B)), which is broadly defined (*Cheriton, supra*, 92 Cal.App.4th at p. 285) and explicitly includes bonuses. (§ 4058, subd. (a)(1); *County of Placer v. Andrade* (1997) 55 Cal.App.4th 1393, 1395-1396 (*Andrade*).) Percentages may be used to calculate child support because it obviates "the need for further litigation with its attendant costs and,

oftentimes, emotional upheaval." (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 95.) However, the support amount must be based on conditions existing when the order is made, not future contingencies. (*Primm v. Primm* (1956) 46 Cal.2d 690, 694; *Cheriton, supra*, 92 Cal.App.4th at p. 298.)

Nonetheless, the statutes provide some flexibility in cases where earnings fluctuate. If the monthly net disposable income "does not accurately reflect the actual or prospective earnings of the parties at the time the determination of support is made," the family court may "adjust the amount appropriately." (§ 4060; *Cheriton, supra*, 92 Cal.App.4th at p. 287; *Andrade, supra*, 55 Cal.App.4th at p. 1396.) Additionally, a family court has the discretion to "adjust the child support order as appropriate to accommodate seasonal or fluctuating income[.]" (§ 4064.)

A permanent child support order may be modified where changed circumstances affect a party's financial status. (§ 3651, subd. (a); *Cheriton, supra*, 92 Cal.App.4th at p. 298.) Such an order "may be made retroactive to the date of filing the petition, complaint, or other initial pleading." (§§ 4009, 3651, subd. (c)(1); *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 595 [the filing date establishes the outermost limit of retroactivity].)

We review child support orders for an abuse of discretion. (*Cheriton, supra*, 92 Cal.App.4th at pp. 282-283.) The family court's exercise of discretion will be upheld if its determination is within the range of the evidence presented (see, e.g., *In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1360) and "to the extent permitted by the child support statutes[.]" (*In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1044.) The

family court's failure to follow the law in setting support constitutes an abuse of its discretion (*Cheriton, supra*, 92 Cal.App.4th at p. 283); however, "the failure to make a material finding on an issue supported by the pleadings and substantial evidence is harmless when the missing finding may reasonably be found to be implicit in other findings. [Citation.]" (*Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445, 1450.)

II. Analysis

Bradley contends the order modifying child support must be reversed because the family court ordered an amount that differed from the guidelines without making findings on the record or in writing. He also contends that the order lacked evidentiary support. We agree.

The family court set a new amount of child support based on the guidelines and the new timeshare allocation and additionally ordered that in any month Bradley's gross earnings exceeded \$9,000, he was to pay 30 percent of the amount over \$9,000 to Elizabeth as additional child support. This order deviated from the guideline amount and the family court had an obligation to recite on the record, or in writing, the reasons for its decision. (§§ 4056, subd. (a) & 4057, subd. (b).) Our review of the transcript of the hearing and the written order reveals that the family court did not adequately state the reasons for its decision. Additionally, the reasons behind any omitted findings are not discernible from the record.

At the hearing, the parties were present with counsel and Elizabeth argued that the court should set child support based on Bradley's past documented earnings. Although the family court found that the May 2004 stipulation was no longer in effect, it noted that

the stipulation provided an "interesting approach" should Bradley return to Iraq. Given Bradley's work history, the court noted there was a question about how to address future changes in Bradley's income and that it needed to reconcile his current income with periods of time in which his income substantially increased.

The court's written order echoed its statements at the hearing, including that the 2004 agreement was no longer in effect and that for the past 12 months Bradley earned an average of \$12,000 per month, based on significant overtime and a bonus for undertaking a dangerous assignment, which was more than the \$7,800 per month used to calculate child support in June 2006. Although the court found there was no evidence that Bradley would be offered or would accept a similar assignment in the future, it nonetheless ordered that he pay a percentage of his future monthly earnings over \$9,000 as additional child support.

While the family court had discretion to make an order that reflected Bradley's *prospective* earnings (§§ 4060, 4064), the evidence was undisputed that Bradley had no plans to return to Iraq and there was no evidence that Bradley's future earnings would change or fluctuate in the future. Similarly, there was nothing in the record to support any implied finding that application of the guideline amount would be unjust or inappropriate due to special circumstances. (§ 4057, subd. (b)(5).)

While the family court could properly take Bradley's earning history into consideration, child support orders must reflect the parties' current circumstances. (*Cheriton, supra*, 92 Cal.App.4th at p. 298.) Here, Bradley's earning history did not accurately reflect his future income and his past bonus and overtime payments should

have been disregarded because it was unlikely he would receive similar earnings in the future. (*Andrade, supra*, 55 Cal.App.4th at p. 1396.) Additionally, the fact that Bradley did not pay child support based on all the money he earned while in Iraq is irrelevant because Elizabeth could have filed a motion to modify child support when Bradley first returned to Iraq. (*Cheriton, supra*, 92 Cal.App.4th at p. 298 [support modification may be made retroactive to the filing date of the motion, but no earlier].)

With that said, Elizabeth filed her petition on May 24, 2007, and Bradley was in Iraq from June 6, 2007 to July 30, 2007. Accordingly, Elizabeth may be entitled to increased child support retroactive to the filing date of the motion and the matter is remanded for further proceedings to address this issue.

In summary, the family court erred in ordering that Bradley pay a percentage of his future earnings as child support and that part of the order is reversed. Based on this conclusion, we need not address Bradley's remaining arguments that the family court erred in failing to cap the amount of support and awarding additional child support based upon an excessive work schedule.

DISPOSITION

That part of the December 24, 2007, order awarding Elizabeth additional child support as a percentage of Bradley's future earnings is reversed. In all other respects,

the order is affirmed. The matter is remanded for further proceedings in accordance with this opinion. Bradley is entitled to his costs on appeal.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.